DR LEE CHONG MENG

v.

RETURNING OFFICER (ABDUL RAHMAN ABDULLAH) & ORS (NO 1)

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[ELECTION PETITION NO: PP-1-2000]
29 MARCH 2000

ELECTION: *Petition - Parties to - Whether Election Commission may be made party to - Whether returning officer may be made party to - Election Offences Act 1954, s. 36 - Election Petition Rules 1954, rr. 10, 15 - Election Commission Act 1957, s. 6*

ELECTION: *Petition - Practice and procedure - Whether Rules of the High Court 1980 applicable - Election Offences Act 1954, s. 42*

The petitioner in this case was a candidate in the Parliamentary Constituency of Bukit Bintang in the General Election held on 29 November 1999. The respective respondents are the returning officer, the Commission and the returned candidate for the constituency, one Fong Kui Lun.

The issues for consideration were: a) whether the Commission and a returning officer can be made parties to an election petition; b) whether resort may be had to the Rules of the High Court 1980 (the RHC) in dealing with the practice and procedure regulating election petitions.

Held:

[1] Statutory requirements of an election must be strictly observed because an election dispute is a statutory proceeding unknown to the common law or equity. The statute confers certain rights and provides a remedy for enforcing those rights. Where that is the case, the remedy provided by that statute only must be availed of.

[1a] There is a presumption that if the court is invested with jurisdiction to determine certain matters additional to its ordinary jurisdiction it is intended to include all the procedures of the court in the absence of express words to the contrary or of reasonably plain intendment. The RHC can therefore only be used in election petition cases if the relevant election laws do not displace the presumption. Section 42 of the Election Offences Act 1954 expressly excludes the use of the

RHC to regulate the practice and procedure on election petitions unless the Election Petition Rules 1954 (the Rules) are clearly varied or revoked by rules of the court. The RHC therefore cannot be resorted to in dealing with election petitions.

[2] The relevant election laws including the Act and Rules do not contain any express provision on the persons who shall be respondents to an election petition. An observation of rr. 10 and 15 of the Rules indicate that they were meant only for returned candidates and service on such candidate respectively.

[2a] Section 6 of the Election Commission Act 1957 on the other hand confers protection and privileges only to members of the Commission and not to the Commission itself. This indicates that Parliament did not intend the Commission to be made a party to an election petition.

[2b] Section 36 of the Act is also worded in contemplation of the Commission not being a party.

[2c] The relief that the court may grant on an election petition throw further light on the proper persons who shall be made respondents. Section 35 indicates that the relief that the court is authorised to grant is in no way against the Commission or a returning officer.

[3] As the duty of a returning officer is to make decisions on objections raised and to interpret relevant laws his function is judicial in nature. The position is somewhat analogous to that of a judge against whose decision an appeal has been lodged. The judge has no interest in the subject matter or the outcome of the appeal but may only be required to take certain steps by the appellate court. A judge is therefore not made a party to the appeal. The position is the same in the case of a returning officer.

[4] The reason for keeping the Commission and its officers out as parties to an election petition is the Commission is an independent body and is the protector and guardian of the electoral process which is the foundation of the democratic system of government. To make such a body a respondent would mean that it would be compelled to defend itself in respect of actions it has taken. This will undermine its independent status.

[First and second respondents struck out as parties.]

Case(s) referred to:

Abu Bakar v. Mohamed Zain [1967] 1 MLJ 168 ***(refd)***
Dewan Undangan Negeri Kelantan v. Nordin Salleh [1992] 2 CLJ 1125 ***(refd)***
Election Commission, Malaysia v. Abdul Fatah Hj Haron [1987] 2 CLJ 193 ***(refd)***
Electric Light and Power Supply Corp Ltd v. Electricity Commissioners of New South Wales [1956] 94 CLR 554 ***(refd)***
Gurmej Singh v. Pratap Singh AIR [1960] SC 122 ***(refd)***
Hamad Mat Noor v. Tengku Sri Paduka Raja Ibrahim & Ors [1993] 4 CLJ 135 ***(refd)***
Harcharan Singh v. Mihinder Singh AIR [1968] SC 1500 ***(refd)***
Houssein v. Under Secretary Department of Industrial Relations and Technology (NSW) [1982] 38 ALR 577 ***(refd)***
Hugh Siak Meng & Anor v. Daing Ibrahim [1975] 4 MC 275 ***(foll)***
In re Kerala Education Bill AIR [1958] SC 956 ***(refd)***
Madaulal Fakir Chand v. Changdeo Sugar Mills AIR [1962] SC 1543 ***(refd)***
NP Ponnuswami v. Returning Officer, Namakkal AIR [1952] SC 64 ***(refd)***
Patterson and James v. Public Service Board of NSW [1984] 1 NSWLR 237 ***(refd)***
Sabdin Ghani v. Mohamed Saidi Lampoh & Ors [1983] 2 MLJ 61 ***(refd)***
Shrilal Janva v. Udai Ram Dhakad AIR [1981] Raj 251 ***(refd)***
State of Kerala v. Malayalam Plantations Ltd [1980] Ker LT 976 ***(refd)***
Sundara Rami Reddy v. Election Commission of India & Ors [1991] Supp (2) SCC 624 ***(refd)***
Tengku Korish v. Mohamed Jusoh & Anor [1970] 1 MLJ 6 ***(foll)***
The Wellington Case [1897] 15 NZLR 454 ***(refd)***
Thomson v. Hill [1870] LR 5 CP 564 ***(refd)***
Tong Swee King v. Pegang Mining Co Ltd & Ors [1967] 2 MLJ 214 ***(refd)***
Vandervell Trustees Ltd v. White [1971] AC 912 ***(refd)***
Wan Daud Wan Jusoh v. Mohamed Hj Ali & Anor [1988] 2 MLJ 384 ***(refd)***
Zulkarnaini Mohamed Noor v. Syed Omar Mohamed & Anor [1979] 2 MLJ 143 ***(refd)***

Legislation referred to:

Election Commission Act 1957, s. 6
Election Offences Act 1954, ss. 42(1), (2), 33(3), 35, 36, 37(2)
Election Petition Rules 1954, rr. 10, 15
Federal Constitution, art. 118

Election Petitions Act 1880 [NZ], s. 20
Representation of the People Act 1951 [India], s. 82

Other source(s) referred to:

Law of Indian Elections and Election Petitions, 3rd edn, p 260
Conduct of Parliamentary Elections, Parker, p 141
Statutory Interpretation, Francis Bennion, 2nd edn, p 875

For the petitioner - Muhammad Shafee Abdullah (Cheong Wee Wong & Burhanudeen Abdul Wahid with him); M/s Shafee & Co
For the 1st & 2nd respondents - Amarjeet Singh SFC
For the 3rd respondent - Karpal Singh (Gobind Singh Deo with him); M/s Karpal Singh & Co

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul J:

The critical issue for determination is whether the Election Commission ("the Commission") and a returning officer can be made parties to an election petition.

The petitioner in this case is Dr Lee Chong Meng who was a candidate in the Parliamentary Constituency of Bukit Bintang in the General Election held on 29 November 1999. The respondents are the returning officer (the first respondent), the Commission (the second respondent) and the returned candidate, Fong Kui Lun (the third respondent), for the constituency. When the case came up for mention on 8 March 2000 for purposes of case management I invited all parties to submit on whether the Commission and a returning officer are proper and necessary parties to an election petition. As the parties required time to look into the point raised I fixed the case for further mention on 23 March 2000. On that date Encik Muhammad Shafee Abdullah, learned counsel for the petitioner, contended that the Commission and returning officer are necessary parties as allegations may be made against them which they have to answer. He added that the Commission is a legal entity which could be sued. Encik Karpal Singh, learned counsel for the third respondent, referred to various provisions of the Election Offences Act 1954 ("the Act") to argue that they are necessary parties. Encik Amarjeet Singh, Senior Federal Counsel representing the first and second respondents, said that they should not be cited as parties. He said that the Commission is not a legal entity to render it liable to be sued.

In India s. 82 of the Representation of the People Act 1951 governs the persons who shall be respondents to an election petition. The sections reads as follows:

> A petitioner shall join as respondents to his petition:
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> (a) where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and
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> (b) any other candidate against whom allegations of any corrupt practice are made in the petition.

Thus it has been held that the Commission (see *Sundara Rami Reddy v. Election Commission of India & Others* [1991] Supp (2) SCC 624) and a returning officer (see *Shrilal Janva v. Udai Ram Dhakad* AIR [1981] Raj 251) are not proper parties to an election petition. It has been held in a New Zealand case that even though a returning officer is required by law to be a respondent his non-joinder is not fatal. The case is *The Wellington Case* [1897] 15 NZLR 454 where it was held that although an election petition complains of the conduct of the returning officer, so that under s. 20 of the Election Petitions Act 1880, he is to be deemed to be a respondent, it is not fatal to the petition that he has not been served as a respondent. With regard to the position in Malaysia the starting point is art. 118 of the Federal Constitution which reads as follows:

> No election to the House of Representatives or to the Legislative Assembly of a state shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.

In referring to this provision in the Federal Constitution Hashim Yeop A Sani SCJ (as he then was) in writing for the (then) Supreme Court in *Election Commission, Malaysia v. Abdul Fatah bin Haji Haron* [1987] 2 MLJ 716 said at p. 717:

> Any controversial matter arising out of the election should be brought up only after the election is over so that the election proceeding may not be unduly hampered or protracted. If a person is dissatisfied with the election he should bring his complaint before an election judge by way of an election petition. Such complaint should not be made an issue before any court while the election is in progress.

This shows that an election may be challenged only by way of an election petition and the applicable laws would therefore be the appropriate laws relating to elections. The relevant laws relating to election petitions are, *inter alia,* the Act and the Election Petition Rules 1954 ("the Rules").

As the jurisdiction of the court to hear election petitions is not conferred by the Courts of Judicature Act 1964 but by art. 118 of the Federal Constitution what merits immediate consideration is the manner of exercising the jurisdiction. It has been accepted that strictly speaking, it is the sole right of the legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it (see *NP Ponnuswami v. Returning Officer, Namakkal* AIR [1952] SC 64). Therefore the statutory requirements of an election must be strictly observed because an election dispute is a

statutory proceeding unknown to the common law or equity (see *Harcharan Singh v. Mohinder Singh* AIR [1968] SC 1500). As Raja Azlan Shah J (as His Highness then was) said in *Tengku Korish v. Mohamed bin Jusoh & Anor* [1970] 1 MLJ 6 at pp. 6-7:

> It is well recognised that I must not go outside the province of the election law. The Election Offences Act, 1954 confers certain rights and provides a remedy for enforcing those rights. Where that is the case, the remedy provided by that statute only must be availed of. Wills J stated this rule with great clarity in *Wolverhampton New Waterworks Company v. Hawkesford* 6 CB (NS) 336; 141 ER 486, 495 in the following passage:
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> > There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, *viz,* where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.
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> The present cases fall within the latter class.
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> The rules cited in this passage was approved by the House of Lords in *Neville v. London Express Newspaper Ltd* [1919] AC 368 and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago v. Gordon Grant & Company* [1935] AC 532.
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> What 'right' does the Election Offences Act, 1954 confer, using the word 'right' in its broad sense? In my judgment, the right conferred by that Act is a special kind of right unknown to the common law or equity, and the court which administers it possesses a special kind of jurisdiction (see *Theberge v. Laudry* [1876] 2 App Cas 102, *Goonesinha v. Hon C I de Kretser* [1945] AC 63 or what is said in *Arzu v. Arthur* [1965] WLR 675 as a peculiar jurisdiction). It is not a civil right but a creature of statute or special law and must be subject to the limitations imposed by it (see *Ponnuswami v. Returning Officer, Nammakkal Constituency & Ors* [1952] SCR 218).

The statutory requirements of election law are mandatory and must be strictly observed: see *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261, *Harcharan Singh v. Mohinder Singh* AIR [1968] SC 1500 and *Chong Thain Vun v. Watson & Anor* [1968] 1 MLJ 65.

It is therefore well-established that the right of a person to file an election petition is derived from a specific statute relating to election and that any procedure laid down by such a special statute shall be strictly adhered to (see also *Hugh Siak Meng & Anor v. Daing Ibrahim* [1975] 4 MC 275). In the light of what I have said thusfar a matter of concern is whether resort may be had to the Rules of the High Court 1980 ("the RHC"), in dealing with the practice and procedure regulating election petitions. There is a presumption that if the court is invested with jurisdiction to determine certain matters additional to its ordinary jurisdiction it is intended to include all the procedures of the court in the absence of express words to the contrary or of reasonably plain intendment (see *Electric Light and Power Supply Corp Ltd v. Electricity Commissioners of New South Wales* [1956] 94 CLR 554; *Houssein v. Under Secretary, Department of Industrial Relations and Technology (NSW)* [1982] 38 ALR 577). *Patterson and James v. Public Service Board of NSW* [1984] 1 NSWLR 237 is an illustration of a case in which the words of the statute displaced the presumption. The RHC can therefore only be used in election petition cases if the relevant election laws do not displace the presumption. Cases such as *Abu Bakar v. Mohamed Zain* [1967] 1 MLJ 168; *Zulkarnaini bin Mohamed Noor v. Syed Omar bin Mohamed & Anor* [1979] 2 MLJ 143; *Wan Daud bin Wan Jusoh v. Mohamed bin Haji Ali & Anor* [1988] 2 MLJ 384; *Sabdin Ghani v. Mohamed Saidi Lampoh & 25 Others* [1983] 2 MLJ 61 and *Hamad bin Mat Noor v. Tengku Sri Paduka Raja Ibrahim & 2 Others* [1993] 4 CLJ 135 say that the RHC may be resorted to. In my opinion the applicability of the RHC to election petitions depends on the interpretation to be accorded to s. 42 of the Act which reads as follows:

(1) The procedure and practice on election petitions shall be regulated by rules of court.

(2) Until varied or revoked by rules of court, the rules contained in the second schedule shall be in force.

The section has two sub-sections. The construction of a section must be made of all its parts together (see *Gurmej Singh v. Pratap Singh* AIR [1960] SC 122). Sub-sections in a section must, therefore, be read as part of an integral whole and as being inter-dependent, each portion throwing light, if need be on the rest (see *Madaulal Fakir Chand v. Changdeo Sugar Mills* AIR [1962] SC 1543). There can be no dispute that the words "rules of court" in the section means the RHC. What therefore arises for

deliberation is whether the section says that the RHC, as it now reads, shall be used to regulate the procedure and practice on election petitions or whether it says that special rules may be made in the RHC for that purpose. The words "… shall be regulated …" in s. 42(1) would appear to suggest that the sub-section refers to the RHC as it stands now. However, on a closer reading of the section as a whole that is not so. The meaning of the phrase becomes manifestly patent upon a consideration of the words "Until varied or revoked by rules of court" in s. 42(2). These words clearly refer to the future. What they mean is that until changes are made in the RHC to vary or revoke the practice and procedure on election petitions as prescribed in the rules, the latter shall be in force. In saying this I derive support from *Hugh Siak Meng & Anor v. Daing Ibrahim bin Othman* [1975] 4 MC 275 where Hashim Yeop A Sani J (as he then was) said at p. 278:

> It is also provided in section 42(2) that until varied or revoked by rules of court the rules contained in the Second Schedule to the Act, ie the Election Petition Rules, 1954 shall have force. I am inclined to hold the view that section 42(2) of the Act excludes the application of the Rules of the Supreme Court until the Rules in the Second Schedule are revoked.

Section 42 therefore expressly excludes the use of the RHC to regulate the practice and procedure on election petitions unless the rules are varied or revoked by rules of court. Thus the presumption that I referred to earlier does not apply. I am therefore of the view that the RHC, in the absence of any specific provision having been made to regulate the practice and procedure of election petitions, and as it stands now, cannot be resorted to in dealing with election petitions.

In resolving the problem posed in the beginning of this judgment the first observation to be made is that the relevant election laws, including the Act and the rules, do not contain any express provision on the persons who shall be respondents to an election petition. What therefore requires consideration is whether such laws contain any implied provision to that effect. I shall first consider the rules. The pertinent provisions are r. 10 and r. 15 of the rules ("r. 10" and "r. 15") which read as follows:

> **rule 10**
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> Any person returned may at any time, after he is returned, send or leave at the office of the Registrar a writing, signed by him, appointing an advocate to act for him in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address within Malaysia at which notices addressed to him may be left. Every such writing shall be stamped with the duty payable thereon under the law for the time being in force.

rule 15

> Notice of the presentation of a petition, accompanied by a copy thereof, shall, within fifteen days of the presentation of the petition, be served by the petitioner on the respondent. Such service may be effected either by delivering the notice and copy aforesaid to the advocate appointed by the respondent under rule 10 or by posting the same in a registered letter to the address given under rule 10 at such time that, in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address given, by a notice published in the Gazette or in a newspaper circulating within the constituency or electoral ward in which the election was held, or posted on the notice board of the High Court in the State in which that constituency or electoral ward is situated, stating that such petition has been presented, and that a copy of the same may be obtained by the respondent on application at the office of the Registrar.

These two rules deal with service of an election petition. It will be observed that r. 10 deals only with returned candidates. The first sentence of r. 15 relates to the period within which the petition must be served. Thereafter the rule prescribes the three methods of effecting such service of the petition. As r. 15 must be read with r. 10 the "respondent" referred to in the former rule must also refer to returned candidates. It is therefore clear that r. 15 is only confined to service on returned candidates. The result is that service on a person other than a returned candidate cannot be done as stipulated in r. 15. The provisions of the RHC cannot be invoked to facilitate service of a petition on persons other than returned candidates as it does not apply to election petitions. The position therefore is that the election laws, which must be strictly adhered to, do not contain provisions regulating service of an election petition on persons other than returned candidates. *Expressio unius est exclusio alterius.* This is a rule of construction pursuant to which the express mention of one thing implies the exclusion of another (see *Thomson v. Hill* [1870] LR 5 CP 564; *In re Kerala Education Bill* AIR [1958] SC 956; *State of Kerala v. Malayalam Plantations Ltd* [1980] Ker LT 976 (FB)). In commenting on this canon of construction Francis Bennion in his book entitled *Statutory Interpretation* 2nd edn says at p. 875:

> Where an Act sets out specific remedies, penalties or procedures it is presumed that other remedies, penalties or procedures that might have been applicable are by implication excluded.

And at p. 876:

> Where it is doubtful whether a stated term does or does not include a certain class, and words of extension are added which cover some only of the members of the class, it is implied that the remaining members of the class are excluded.

There is therefore clear indication in r. 10 and r. 15 that the Rules recognise only returned candidates as respondents to an election petition.

I now refer to s. 6 of the Election Commission Act 1957 which reads as follows:

> Every member of the Election Commission shall have the like protection and privileges in case of any action or suit brought against him for any act done or omitted to be done by him when acting in the execution of his office as is by law given to a Magistrate acting in the execution of his office.

The protection and privileges accorded by the section is only to members of the Commission and not to the Commission itself. It would indeed be absurd to protect the members of the Commission and leave exposed the Commission itself. This also indicates that Parliament did not intend the Commission to be made a party to an election petition.

Next, I refer to s. 36 of the Act which reads as follows:

> At the conclusion of the trial of an election petition the Election Judge shall determine whether the candidate whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination –
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> (a) to the Election Commission in the case of an election of a person to be a member of the Dewan Rakyat, a Legislative Assembly, the municipal council of the federal capital or of any other election that the Election Commission may be authorized to conduct; or
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> (b) in the case of any other election, to the State Authority,
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> upon such certificate being given such determination shall be final; and the return shall be confirmed or altered, or the Election Commission the State Authority (as the case may be) shall within one month of such determination give notice of election in the constituency or electoral ward concerned, as the case may require, in accordance with such certificate.

In my opinion the need to certify the determination of the court to the Commission at the conclusion of the trial will only arise if the Commission was not a party to the petition in the first place. If the Commission was contemplated to be a party the remedial measures to be taken by the Commission are matters which the court would have been expressly authorised to order. In that event there would have been no need for Parliament to require the certification to be made to the Commission as it, being a party, would know the result and would be bound to act accordingly. It is my view that the section is so worded in contemplation

of the Commission being not a party. The purpose of the section is to make the Commission, being a non-party, to be bound by the order made by the court as normally only parties to proceedings are bound by orders made by a court.

Finally, the reliefs that the court may grant on an election petition throw further light on the proper persons who shall be made respondents. It must first be observed that the Commission is merely charged with the responsibility of conducting the election and it would, of course, be indifferent to the result of the election; its rights in no way being at stake (see *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh* [1992] 2 CLJ 1125). Thus the Commission, and for that matter the returning officer as well, have no interest or right to protect in an election petition. A person can be made a party to an action only if he has a legal interest in the subject matter of the action and not merely a commercial interest (see *Tong Swee King v. Pegang Mining Co Ltd & Ors* [1967] 2 MLJ 214). Thus as Lord Diplock said in *Vandervell Trustees Ltd v. White* [1971] AC 912 at p. 944:

> A party to an action must be a person who claims in that action some relief against another party to the action or against whom some relief is claimed by another party to the action. There is, in my view, no jurisdiction to add as a party to an existing action a person by and against whom no relief which the court has jurisdiction to grant can be claimed.

The interest of the Commission and a returning officer in an election petition can be discerned from the reliefs that a petitioner is entitled to. This is provided by s. 35 of the Act. The section reads as follows:

> All or any of the following reliefs to which the petitioner may be entitled may be claimed in an election petition:
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> (a) a declaration that the election is void;
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> (b) a declaration that the person was not duly elected or ought not to have been returned;
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> (c) a declaration that any candidate was duly elected and ought to have been returned; and
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> (d) where the seat is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, a scrutiny.

The orders that a court is authorised to make refer, in effect, to the proper order that a returning officer ought to have made at the conclusion of an election. After making an order as required by this section the High Court shall certify its determination to the Commission which shall take the

necessary steps as provided by s. 36 of the Act. It will therefore be seen that the reliefs that the court is authorised to grant are in no way against the Commission or a returning officer. They merely amount to a reversal of the decision made by a returning officer. This brings into focus another issue. As the duty of the returning officer is to make decisions on objections raised and to interpret relevant laws his function is judicial in nature. The position is somewhat analogous to that of a judge against whose decision an appeal has been lodged. The judge has no interest in the subject matter or the outcome of the appeal but may only be required to take certain steps by the appellate court. A judge is therefore not made a party to the appeal. It is my view that the legal position ought to be the same in the case of a returning officer. In this regard I refer to *Parker's Conduct of Parliamentary Elections* which says at p. 141:

> He (the returning officer) is a judge of fact, and the fact in all cases within his jurisdiction is whether the requirements of the law with respect to the filing up, signature, and time of delivery of a nomination paper have, in substance and in common sense, been complied with. In the exercise of this function, the returning officer acts judicially, and he must therefore proceed with the utmost *bona fides* and impartiality ….

Further as Mr Justice GL Srivastara says in his book entitled *Law of Indian Elections and Election Petitions* 3rd edn at p. 260:

> An Election Tribunal held as far back as 1927 (Central Provinces MR 1927: Hammond, P 291: DECI p 324) that it is not necessary or proper to make the local Government or the Returning Officer a respondent to an election petition. The Returning Officer performs a judicial function in determining the objections to a nomination and he can only be joined as respondent if there is misappropriation or misconduct as distinct from the erroneous decision on a point of law.

The misappropriation or misconduct referred to in the above passage is, to my mind, any corrupt or illegal practice for which provision is made by s. 37(2) of the Act. The sub-section deals with the manner of taking action against a person, which would include a returning officer, who is not a party to an election petition.

There are sound reasons for keeping the Commission and its officers out as parties to an election petition. Firstly, the Commission is an independent body and is the protector and guardian of the electoral process which is the foundation of the democratic system of government. To make such a body a respondent would mean that it would be compelled to defend itself in respect of actions it has taken. This will undermine its independent status. That does not mean that the Commission is not accountable for its

actions. It can be summoned by either party as a witness to account for its actions. In coming as a witness the Commission would be in an independent position to explain its conduct and thereby continue to remain as an independent body. Furthermore, the Commission being not a party will not prejudice a petitioner in any way. As Edgar Joseph Jr SCJ said in *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh* [1992] 1 MLJ 697 at p. 725:

> As for the non-joinder of the Election Commission, in the proceedings in the court below, I do not consider that this in any way prevented the learned trial judge from granting the declaration prayed for in the exercise of his discretion. The Election Commission was merely charged with the responsibility of conducting the election and it would, of course, be indifferent to the result of the election; its rights being in no way at stake. In any event, even had it been made a party to the proceedings in the court below, I am completely convinced that it would have made no difference to the result of the litigation, so that it could not be said that there was a real likelihood of it having suffered any prejudice.

Additionally, the non-joinder of the Commission and a returning officer as respondents will not prejudice the petitioner because s. 33(3) of the Act provides that any person who has "… been concerned in the election to which the petition refers …" may be compelled to attend the proceeding by either party or the court itself. Thus the petitioner or the respondent may call the Commission members or its officers as witnesses in support of their case. I pause to add that it is the duty of the officials concerned to testify on matters within their knowledge as, failing which, they can be compelled by the court to do so.

I therefore hold that the Commission and a returning officer are not necessary parties to an election petition. The addition of a person as a party, when it is not proper and necessary to do so, would result in the party being penalised by way of costs. Accordingly, I strike out the first and second respondents as parties.